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No. 98-865

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ANR PIPELINE COMPANY and
COLORADO INTERSTATE GAS COMPANY,
Petitioners,

v.

JOHN D. LAFAVER,
Secretary of the Kansas Department of Revenue, and
MARK S. BECK,
Director of the Division of Property Valuation
of the Kansas Department of Revenue,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

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In the decision below, the Tenth Circuit squarely held, interpreting this Court's recent decision in *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), that the Eleventh Amendment bars any federal court action challenging the constitutionality of a state's tax, even where that action seeks prospective equitable relief, and even where the state courts do not provide their own judicial remedy. As the Petition for Certiorari demonstrated, the Tenth Circuit's holding (1) conflicts with decisions of other federal courts of appeals interpreting *Coeur d'Alene*; (2) conflicts with numerous decisions of this Court and of the courts of

appeals that have either squarely held, or necessarily assumed, that a taxpayer may bring an *Ex parte Young* action to challenge the lawfulness of a state's tax; (3) renders a vital component of the Tax Injunction Act an utter nullity; and (4) leaves numerous taxpayers in states covered by the Tenth Circuit without access to any court —state or federal—in which to bring an action to vindicate their federal rights.

In an evident effort to obscure the fundamentally important constitutional question forthrightingly decided by the court below and thus squarely presented in this case, respondents present a series of false and irrelevant claims about the relief that the pipelines are now seeking from the state officials, the holding below, and the decisions with which the Tenth Circuit's holding conflicts. None of the arguments advanced by the respondents undermines petitioners' demonstration of the necessity for this Court's review.

1. As the pipelines demonstrated in the Petition for Certiorari, the decision below squarely conflicts with decisions by the Fifth, Eighth and Ninth Circuits regarding the impact of this Court's decision in *Coeur d'Alene* on the continued availability of *Ex parte Young* actions. In particular, whereas the Tenth Circuit clearly held that *Coeur d'Alene* requires a court to dismiss an action that satisfies the traditional *Ex parte Young* test if that action nevertheless " 'implicates special sovereignty interests,' " Pet. App. 21a, the Fifth, Eighth and Ninth Circuits have each held that the "traditional" *Ex parte Young* doctrine survives *Coeur d'Alene*. Accordingly, in those circuits a suit that names a state official and seeks prospective equitable relief to remedy an ongoing or future violation of federal law may be brought in federal court regardless of whether the matter at issue involves the " 'special sovereignty interests' " of the State. Pet. 15-17.

Respondents nevertheless argue that the Tenth Circuit's construction of *Coeur d'Alene* does not conflict with the

decisions of the other circuits because those decisions "involved very different facts" and did not arise "in a tax context." To be sure, the Fifth, Eighth and Ninth Circuit decisions construing *Coeur d'Alene* are not "tax" cases. That fact, however, does nothing to alter the fundamental disagreement among the circuits on the purely legal question of whether the existence of important state interests creates an Eleventh Amendment bar to federal court jurisdiction even where the traditional *Ex parte Young* test is satisfied. The Tenth Circuit clearly held that it does, whereas the other three circuits held that the importance of the state's interests is irrelevant. Nothing in the opinions of the Fifth, Eighth and Ninth Circuits suggests that their holdings are, or will be, limited to their facts, or that they would have reached a different result if the case had involved state taxes.

2. Apparently recognizing that their efforts to distinguish away the circuit conflict on the continued availability of *Ex parte Young* actions is unconvincing, respondents alternatively suggest that the question regarding the impact of *Coeur d'Alene* on the traditional *Ex parte Young* test is not presented by the decision below because the pipelines' claims failed to satisfy even the "traditional *Ex parte Young* doctrine." In particular, respondents assert that the pipelines' claims against the state officials sought purely retroactive relief and that the Tenth Circuit's decision "recognized" this "fact[]." Opp. 4-5. Respondents' argument significantly distorts both the pipelines' claims and the Tenth Circuit's holding.

Although petitioners' complaint initially sought some forms of relief that were admittedly "retroactive" within the meaning of the Eleventh Amendment, none of those claims is presently before the Court.[1] Instead, petitioners

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[1] The Tenth Circuit held that the pipelines' request that the district court "declare that the state defendants have wrongfully valued the pipelines' property in the past" and that "the state defendants should recertify past tax year assessments" sought "retrospective" relief that was barred by the "long-accepted" *Ex*

seek review only of the Tenth Circuit's dismissal of relief that was clearly prospective. As the complaint that respondents attach makes quite clear, the pipelines have from the beginning of this suit asked for a declaration, *inter alia,* that the defendants have engaged in "ongoing" discriminatory taxation and assessment, that they "continue to wrongfully value[] [and] assess" such property, and that the Kansas officials should therefore "recertify" to counties "for . . . future tax years lawful values which comply with" the federal constitution. Opp. App. A-11. In stark contrast to the respondents' misleading assertions, the Tenth Circuit admitted that "the pipelines' request for declarations as to the state defendants' ongoing practices and the property valuations for future years" "might lie within the *Ex parte Young* doctrine." Pet. App. 23a. Indeed, recognizing that these claims were indeed prospective, the Tenth Circuit captioned this portion of its opinion "*Prospective Relief* under *Coeur d'Alene Tribe.*" Pet. App. 27a (emphasis added).[2] The Tenth Circuit thus clearly

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parte Young test insofar as the declarations "merely ha[ve] the practical effect of adjudicating retrospective liability issues that would otherwise arise in a suit for money damages" against the state, and the pipelines are *not* seeking review of this aspect of the Tenth Circuit's decision. Pet. App. 22a.

Although the pipelines are also seeking a refund of prior year taxes, the pipelines' complaint makes clear that this relief has been sought only from the county defendants, not the state officers. Complaint, ¶ 46(F), Opp. App. A-11. The district court held that the claims against the counties were not barred by the Eleventh Amendment, Pet. App. 35a-36a, and none of the county defendants sought an interlocutory appeal of that decision or was a party below. Pet. App. 4a n.1. Respondents' extended discussion of the purported Eleventh Amendment bar on the claims against the counties is thus irrelevant. Opp. 4 & n.4.

[2] Respondents apparently believe that the pipelines' claims for equitable relief for future tax years are nevertheless retrospective because such relief would require the state officials to recertify the pipelines' utility values. As the Fourth Circuit recently held in analogous circumstances, this is a " 'nonsensical argument.' " *CSX Transp., Inc.* v. *Board of Pub. Works,* 138 F.3d 537, 542 (4th Cir.), *cert. denied,* 119 S. Ct. 63 (1998). Because the only effect of re-

held that federal actions challenging unconstitutional state taxes were barred by the Eleventh Amendment even with respect to purely prospective relief.

Remarkably, respondents' erroneous assertion that the pipelines below sought only retrospective relief is the *only* basis respondents offer for distinguishing the decision below from the holdings in *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299 (1952) and other cases that specifically uphold the availability of *Ex parte Young* actions in the tax context. Respondents' opposition thus confirms that the Tenth Circuit's decision also conflicts with *Redwine* and its progeny, and thus warrants review by this Court on this independent ground. See Pet. 17-20.

3. Respondents next claim that the Kansas courts afforded the pipelines a "plain, speedy and adequate" remedy, and go so far as to state that the Tenth Circuit so held. Opp. 2-3, 5. This claim is both false and irrelevant.

As the Petition for Certiorari demonstrated, Pet. 5-7, the Kansas courts disposed of the pipelines' constitutional claims without granting the pipelines an opportunity to brief their merits or introduce any evidence. The federal district court below thus had little difficulty finding that the pipelines were not provided a plain, speedy and adequate remedy in the state courts, and that the Tax In-

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certification would be to alter the tax liabilities for future years, the relief is clearly prospective:

> [The state officials] in effect argue[] that an injunction against the future collection of illegal taxes is retrospective and unavailable merely because the state has already decided how much to collect, even though the money is still safely in the taxpayer's pocket. If we were to accept this argument, no injunction could issue pursuant to *Ex parte Young* if the action to be enjoined had already been decided upon by a state official. But, of course, plaintiffs have no way to know that they must sue to enjoin an official's action until after the official has decided to take that action.

CSX, 138 F.3d at 542.

junction Act thus did not bar the pipelines' claims. Pet. App. 35a. Contrary to the respondents' claims, the Tenth Circuit did not reverse the district court's finding, let alone even suggest that it was clearly erroneous. Although the Tenth Circuit mused that it was "inclined to disagree" with the district court's conclusion that the pipelines' claims were not barred by the Tax Injunction Act, the Tenth Circuit expressly declined to "make a final decision as to the adequacy of Kansas' judicial procedures." Pet. App. 26a; see also Pet. App. 30a. Instead, as the Petition demonstrated, the Tenth Circuit expressly concluded that the Eleventh Amendment barred the pipelines' claims *whether or not* Kansas provided them with adequate judicial remedies. *Id.;* see also Pet. App. 30a ("Although we recognize the predicament the pipelines face, we are constrained by the Eleventh Amendment and the special sovereignty interest a state has in the control of its property tax system"). The respondents' assertions to the contrary notwithstanding, this case thus squarely presents the question whether the Eleventh Amendment bars a federal court action challenging a state's tax even where the state provides no judicial remedies of its own.

Moreover, at the end of the day, whether the district court's fact-specific holding with regard to the Tax Injunction Act was correct or not is irrelevant. Unless reversed by this Court, the ruling below will preclude any taxpayer within the Tenth Circuit from bringing an *Ex parte Young* action to challenge the constitutionality of a state's tax, even where that state provides no adequate judicial remedies of its own, thereby rendering a vital component of the Tax Injunction Act an utter nullity. Pet. 20-22.

4. Finally, relying exclusively on Justice Kennedy's opinion. respondents claim that the Tenth Circuit correctly interpreted *Coeur d'Alene* as barring otherwise valid *Ex parte Young* actions whenever they implicate "the special interest of state sovereignty." Opp. 8. Of course,

where, as here, a case presents a clear conflict with decisions of this Court and of the courts of appeals on an issue of fundamental importance, it is no objection to a grant of certiorari that the decision might be affirmed.

At the same time, the respondents' exclusive reliance on those portions of Justice Kennedy's opinion in *Coeur d'Alene* that addressed Idaho's "special interest of state sovereignty," Opp. 8, vividly highlights the need for this Court's review. Although those portions of Justice Kennedy's opinion were joined by a majority of the Court, three members of that majority also signed Justice O'Connor's concurring opinion, which criticized "replac[ing] a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective with a vague balancing test" that focuses on the "importance of state interests." 521 U.S. at 296 (O'Connor, J., concurring). As the Petition explained, the obvious tension between the majority opinion and Justice O'Connor's opinion for a controlling plurality has resulted in the very conflict among the circuits that is embodied in the Tenth Circuit's decision and that requires this Court's resolution.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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